



DATE: APRIL 19, 1996

CASE NO. 96-TLC-1

IN THE MATTER OF:

HOYT ADAIR.
Employer

Appearances: Stan Eury, President, International Labor Management Corporation
For the Employer

Annaliese Impink, Esq., Office of the Solicitor
For the Regional Administrator, U.S. Department of Labor

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

This matter arises pursuant to the temporary agricultural employment sections of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(H)(ii), 1184 and 1188, and the implementing regulations set forth at 20 C.F.R. Part 655, Subpart B (§§655.0-655.00, 655.90-65.113). The International Labor Management Corporation has requested administrative review", on behalf of Employer, Hoyt Adair (hereafter "Employer"), pursuant to 20 C.F.R. § 655.112(a). This regulation directs that the administrative law judge review the record "for legal sufficiency". 20 C.F.R. § 655.112(a).¹

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On February 8, 1996, Employer filed forms ETA-750 (Application for Alien Employment Certification) and ETA-790 (Agricultural and Food Processing Clearance Order) seeking to fill twenty positions as "Farmworker Fruit I" (DOT 403.683-010)² for the period from

¹ In contrast, review under 20 C.F.R. § 655.112(b) allows for a *de novo* evidentiary hearing to be conducted.

² The position of "Farmworker, Fruit I" is classified under code 403.683-010 of the *Dictionary of Occupational Titles* (DOT), while "Farmworker, Fruit II" is 403.687-010.

April 9 to November 1, 1996. Administrative File (AF) at 52-65.³ The job duties for that position included "budding and pruning trees" as well as picking fruit, placing it in containers, and thinning fruit. AF 56, 65. In a referenced attachment, as well as on the ETA-750, the Employer specified the following experience requirements: "Workers should have a minimum of 6 months experience in budding trees and pruning trees." AF 56, 65.

On February 20, 1996, the Acting Regional Administrator (hereafter "RA") for the Employment and Training Administration, Region IV, issued a letter rejecting the Employer's application but advised that a modified application correcting the asserted deficiencies could be filed. AF 32-35, *see also* AF 28-31. In a "Checklist Enclosure for Unacceptable Applications", the RA, citing 20 C.F.R. § 655.102(c),⁴ directed the Employer to either delete the experience requirement, "or provide verifiable documentation from the employer to substantiate that such a requirement is 'normally' required by other employers in the area of employment," including "the names and telephone numbers of the employers who utilize such a requirement in the hiring of workers doing the same work (budding and pruning fruit trees) for which certification is requested."⁵ AF 35.

Employer subsequently filed an amended application, which was received on February 26, 1996. AF 36-51; *see also* AF 24.⁶ In the amended application, the Employer specified only 2 months experience in budding trees and pruning trees. AF 40.

On March 11, 1996, the RA issued a letter rejecting the modified application. AF 24-27, *see also* AF 13-16. In the "Checklist Enclosure for Unacceptable Applications," the RA stated:

Your response received on 2/26/96, did not contain the required information from "other employers in the area of intended employment." The employer information you submitted was for nurseries which employ Horticultural Workers. The application on the other hand is for Fruit Farmworkers which is a different

³ Unless otherwise indicated, references are to the replacement Administrative File and will appear as "AF" followed by the pertinent page number.

⁴ Section 655.102(c) provides that "[b]ona fide occupational qualifications specified by an employer in a job offer shall be consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops, and shall be reviewed by the RA for their appropriateness;" the section also authorizes the RA to require the employer to submit documentation to substantiate the appropriateness of the specified qualification and to consult with the U.S. Department of Agriculture.

⁵ Other grounds for rejecting the application were not asserted in the RA's final letter rejecting the application. Accordingly, they are not considered on this review.

⁶ The case file does not make it clear what specific supporting documentation was provided by the Employer at this time.

occupation. Information to support the experience requirement will be considered only for the occupation for which certification is requested.

Submit the requested information from other employers who employ Fruit Farmworkers in the area of employment or delete the requirement.

AF 26-27. On March 18, 1996, the RA apparently received additional information from the Employer, which it also found to be lacking. AF 11-12.

The case file is unclear as to when the materials provided by Employer (AF 17-23) were submitted to the RA. The documentation submitted by the Employer indicated that the experience requirement had been changed from 6 months to 2 months. AF 17. Employer also attached three letters from persons characterized as "experts in the field of budding fruit trees from the Alabama Cooperative Extension Service [who] clearly stated that employers require experience for budding of fruit trees." *Id.* Employer pointed out that ETA Handbook No. 398 states that appropriate sources of occupational information are the *Dictionary of Occupational Titles* (DOT) and consultation with Cooperative Extension Service representatives, and that the SVP (specific vocational preparation) for Farmworker Fruit I in the DOT is SVP-5 (over six months to one year experience or training).⁷ *Id.* Employer asserted that it could not find an employer in the area of employment that budded fruit trees, but that it obtained a list of the closest employers it could find with the assistance of the Cooperative Extension Service. *Id.* Finally, Employer noted that the positions applied for are Farmworker Fruit I, whose duties include budding and grafting, and not Farmworker Fruit II. *Id.*

The letters submitted by the Employer were addressed to Stan Eury, who is identified as Director of the N.C. Growers Association, Inc., and were all dated February 23, 1996. The first is from an Assistant County Agent of the Alabama Cooperative Extension Service ("Auburn University, U.S. Department of Agriculture and Counties Cooperating"), who states that "practically all growers do require that job applicants for budder positions possess former job experience. as well as some degree of skill in budding and grafting." AF 20. The second letter is from the Chair of the Department of Horticulture at Auburn University, who indicates that experience in budding is very important for budders of fruit crops. AF 21. The third letter is Handwritten. and the signature is partially illegible, although it is on Auburn University Alabama Agricultural Experiment Station letterhead. AF 22. The writer indicates that the experience at the Experiment Station has been that the window of opportunity for budding and grafting is such that inexperienced personnel would cause havoc in the operation and further indicates that experienced personnel are extremely difficult to locate in the area. Attached was a list of three names entitled "List of Growers to Who (*sic*) Requires Experience." AF 23.

Also incorporated in the Administrative File, under a transmittal telefax dated February 23, 1996 from Steve Horton, Alabama State Employment Service, State of Alabama Department

⁷ The Employer enclosed the DOT listings for Farmworker, Fruit I and Farmworker, Fruit II. In contrast, the SVP for Farmworker, Fruit II is 2, which translates to up to one month of experience and training.

of Industrial Relations, is a tabular report of a "Wage Survey for Fruit Farmworker." The survey does not indicate what duties the listed "Fruit Farmworker" would be required to perform or whether Farmworkers, Fruit I or Farmworkers, Fruit II, or both, are concerned. Four fruit orchards are listed, and under "Experience Required" the entry "None" appears for all four orchards. For two, Reeves Orchard and Roberts Orchard, the entry "Yes" appears under the Heading "Pruning & Budding." The prevailing wage is listed as \$4.51. (AF 75-76). It is unclear when this document was incorporated in the Administrative File or whether it (or the listed information) was ever provided to the Employer.

On March 26, 1996, the RA issued a denial determination, finding that Employer had failed to provide verifiable information of other employers in the area of intended employment "who employ workers in budding and pruning as well as harvesting fruit." AF 11-12. The RA indicated that information from the Alabama Department of Industrial Relations did not support an experience requirement, and cited section 216(c)(3)(ii) of the Immigration Reform and Control Act of 1986, and 20 C.F.R. § 655.102(b)(14)(c).⁸

International Labor Management Corporation (ILMC) on behalf of Employer filed this request for expedited review by telefax on April 1, 1996. The original Administrative File was received by the Office of Administrative Law Judges on April 11, 1996, and a replacement Administrative File was received on April 15, 1996. The Memorandum transmitting the case file to this Office, appearing in both the original and the replacement file, refers to an application for Farmworker, Fruit II, although the Employer has consistently identified the job as Farmworker, Fruit I.

The Administrative File also includes a memo dated April 5, 1996 from Steve Horton, ASES (Alabama State Employment Service) to Steve Becker, U.S. Department of Labor. AF 68; *see also* AF 75. Mr. Horton indicated his belief that the Employer's application "appears to fall more in the Fruit Worker II DOT area," as most of the work involves harvesting, with some budding and grafting associated.⁹ *Id.* Attached to the April 5, 1996 memo are additional memos and notes -- apparently the ones referred to in the RA's March 26, 1996 denial letter -- but it is not clear when these documents became incorporated in the file or if they were provided to the Employer. It appears that a representative from ASES, James D. Howard, contacted the two growers and one organization listed by Employer and their reported responses are set forth in a list signed by Mr. Howard. AF 70. The first listed grower, Empire Wholesale Nursery, reportedly grows fruit trees mainly and the "[w]ork is easy to catch on and can be learned in a short time." *Id.* The second, Cumberland Valley Nurseries, reportedly grows fruit trees, uses

⁸ This is probably meant to be a citation to section 655.102(c).

⁹ It appears that Mr. Horton's memorandum was created after the RA made the denial determination and Employer's request for review was made. Although the regulations indicate that the administrative law judge (ALJ) is to consider the case file transmitted by the RA, they also indicate that the ALJ should not receive additional evidence. Since it does not appear that Mr. Horton's April 5, 1996 memorandum was in existence at the time the RA made the denial determination, it will be considered additional evidence that cannot be considered.

local workers, and indicates that "[t]hey can learn the work quickly." *Id.* The third, actually a research organization rather than a grower, reportedly hires local workers and indicates that "[t]hose doing budding and grafting...require considerable more time to learn their jobs than those who weed, hoe, and do other simple labor work." *Id.* A "Note to the File" dated February 1996 and signed by Mr. Horton indicates that he spoke to the owner of the first nursery listed, Empire, who stated that he preferred experienced workers, but that he could train personnel in less than one week, "if that person had the talent to perform that job." AF 71. He indicated that "some people learned very quickly and some could ruin your entire crop of trees if they were not careful." *Id.*

The Administrator's Brief was filed on April 15, 1996. Included as an attachment is an excerpt from the H-2A Program Handbook (ETA Handbook No. 398) including the information cited by the Employer.

By telefax transmission of April 15, 1996, the Employer's representative, Stan Eury of ILMC, asserted that there was a significant misrepresentation in the record submitted by the Department of Labor (DOL) in the instant case. Specifically, he advised that Employer had not been made aware of the factual basis for the Department of Labor's ruling until recently, when the Employer learned (as stated on page 74-75 of the original Administrative File, now at AF 75-76) that Reeves Orchard and Roberts Orchard were reported to not require experience for budding fruit trees. Mr. Eury asserts that when these two growers were contacted they stated that they did not bud fruit trees and one stated that he was not even contacted by the employment service. Signed statements to this effect from Robert's Orchards, Athens, Alabama and Reeves' Peach Farm, Hartselle, Alabama were included as attachments.

In a response telefaxed by the Solicitor's Office on April 16, 1996, the RA asserts that any error which might have occurred in the survey is irrelevant to these proceedings, which are under 20 C.F.R. § 655.112(a) and which must therefore be confined to a review of the record for legal sufficiency, and that the administrative law judge reviewing this matter is proscribed from either remanding the case or receiving additional evidence. The RA further asserts that the attachments to Mr. Eury's letter are inadmissible and should not be considered, but even if they are considered, the application should fail for lack of proof that farmers engaged in the production of fruit, as opposed to nurseries engaged in the production of trees, ever required experience in budding and pruning as a condition of employment.

DISCUSSION

Based upon my review of the record for legal sufficiency, I find that the RA has not set forth a legally sufficient basis for denying the application for temporary alien agricultural labor certification (for H-2A workers) and that the Employer has asserted a legally sufficient basis for the application to be granted. Accordingly, I must reverse the RA's denial of labor certification.

The Immigration and Nationality Act allows the importation of aliens into the country, to perform temporary agricultural work if the Secretary of Labor has certified that there are not sufficient workers who are able, willing, qualified and available at the time and place the labor is

needed and the employment of the aliens will not adversely affect the wages and working conditions of workers in the United States who are similarly employed. 8 U.S.C. § 1188(a)(1)(A), (B). An employer who wishes to hire temporary agricultural workers who are aliens must file an application with the Regional Administrator (RA) for the appropriate geographical area indicating the number of aliens and other pertinent information, and the employer must otherwise comply with the requirements set forth in 20 C.F.R. Part 655, Subpart B. *See* 20 C.F.R. §§ 655.90, 655.100, 655.101, 655.102.

In the instant case, the RA has specifically challenged the Employer's compliance with the regulation at 20 C.F.R. § 655.102(c). That subsection provides:

Appropriateness of required qualifications. Bona fide occupational qualifications specified by an employer in a job offer shall be consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops, and shall be reviewed by the RA for their appropriateness. The RA may require the employer to submit documentation to substantiate the appropriateness of the qualification specified in the job offer, and shall consider information offered by and may consult with representatives of the U.S. Department of Agriculture.

Consistent with these requirements, the Employer has submitted an application which indicates that the workers will be employed as Farmworkers, Fruit I, and contrary to the RA's assertion, has substantiated that the experience requirement is a normal and accepted qualification for comparable workers not involved in the H-2A program.

First, the duties required are clearly listed in the ***Dictionary of Occupational Titles*** (DOT) as being typical duties of the position of Farmworker, Fruit 1; and the experience required, both in the original and amended applications, falls within the purview of the SVP (specific vocational preparation) listed for that position within the DOT (i.e., the position has an SVP of 5 which translates to over six months to one year of combined experience and training.) These DOT listings, in and of themselves, are strong evidence that the position has been described by the Employer in a manner "consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops." Moreover, the job description of Farmworker, Fruit I clearly encompasses the experience requirement set forth by the Employer in the application, both in its original and amended form, even though Farmworker, Fruit II, would not. I find no basis for concluding that the position is for a Farmworker, Fruit II, in view of the unrefuted assertion that "budding"¹⁰ will be required; the duties of selecting, cut[ting], and graft[ing] stock-wood (scion) onto tree stem or trunk to propagate fruit...trees" appear in Farmworker, Fruit I, but not in Farmworker, Fruit II, although both job descriptions include pruning trees, thinning fruit, and picking fruit.

¹⁰ In the Job Specifications related to "Peaches, Apples and Pears," the Employer states: "Workers may select cut and graft stockwood (scion) onto tree stem or trunk to propagate fruit trees (referred to as 'budding trees')." AF 55-56.

Second, in response to a request from the RA, the Employer provided a list including the names, addresses and telephone numbers of two growers (nursery owners) who budded fruit trees as well as additional documentation from persons at Auburn University involved in the area of agriculture, including the Chair of Auburn University's Department of Agriculture and an agent of the Alabama Cooperative Extension Service (which cooperates with the U.S. Department of Agriculture). These individuals attest to the fact that experience in budding and/or grafting is a typical requirement for budders of fruit crops and that it is important for a successful operation. Experience in budding and pruning was the only experience required by the Employer here.

The Regional Administrator's Brief argues that the documentation is insufficient because it is derived from nurseries rather than fruit orchards and it only relates to requirements for budders of fruit crops as opposed to agricultural workers who perform multiple duties. (Regional Administrator's Brief at pages 7-9). Specifically, the RA argues that documentation should come from orchard owners in the area of intended employment who employ workers in budding and pruning as well as harvesting fruit.¹¹

I reject the RA's argument that the application is deficient because of the Employer's failure to provide verifiable information of other orchard owners in the area of intended employment who employ workers in budding and pruning as well as harvesting fruit; such an argument seeks to apply a legally unsupportable standard. The regulatory standard is that the job qualification "shall be consistent with the normal and accepted qualifications required by non-H-2A employers in the same or comparable occupations and crops." I find that the DOT listing in and of itself is sufficient to establish that both the combination of duties and the experience requirement are normal and acceptable, and the additional information provided by the Employer corroborates the DOT listing. Employer's letters of support from credible sources clearly state the need for experience in budding and grafting, the DOT job description clearly recognizes a mixture of harvesting, pruning, and budding and grafting work, and the SVP recognizes that some training is necessary for this category of fruit farmworker.

The RA's reliance upon the tabular report of a "Wage Survey for Fruit Farmworker" from Steve Horton, Alabama State Employment Service, State of Alabama Department of Industrial Relations is also misplaced. As noted above, the survey does not indicate what duties the listed "Fruit Farmworker" would be required to perform or whether Farmworkers, Fruit I or Farmworkers, Fruit II, or both, are concerned. Only four fruit orchards are listed, the survey was apparently done as a "wage survey," and the entire survey consists of the following table, which was reportedly obtained by a telephone survey during the period from February 12 through February 21, 1996:

¹¹ Although the RA also criticizes the author of the handwritten note as being "disingenuous" for arguing that experienced budders are "practically nonexistent around here" and also suggesting that such experience is essential (Regional Administrator's Brief at page 8), the RA's criticism is, in my view, based on a misreading of the letter. What the author is apparently stating is that such experienced workers **seeking employment** are not available locally and new hires must be brought in from other areas, i.e., other parts of the country or foreign countries. *See* AF 9.

| <u>Employer</u> | <u>Wage Rate</u> | <u>Experience Required</u> | <u>Pruning & Budding</u> | <u>Crops Grown</u> |
|-----------------|------------------|----------------------------|------------------------------|-------------------------------------|
| Reeves Orchard | \$4.70 | None | Yes | Peaches, Apples, Strawberries |
| Isom Orchard | \$4.25 | None | No | Peaches, Apples, Plums, Pears |
| Pepper Orchard | \$4.75 | None | No | Peaches, Apples, Strawberries |
| Roberts Orchard | \$4.35 | None | Yes | Peaches, Apples |
| Prevailing Wage | \$4.51 | | | |

(AF 76).

This wage survey does not provide a legally sufficient basis for denial of the application. In this regard, it leaves open as many questions as it answers and I do not find that it provides sufficient definitive information for any reasonable person to draw the conclusion that orchard owners employing farmworkers for pruning and budding do not require any experience.

As noted above, the RA has asked that I not consider the rebuttal information concerning this survey submitted by the Employer because under 20 C.F.R. § 655.112(a)(1) I am directed not to receive additional evidence or remand the matter in the course of this review. If, in fact, there were material misrepresentations in the record, I am unable to agree that due process would not require that I at least allow evidence to be submitted for the limited purpose of determining whether tainted evidence should be stricken from the record. I do not, however, find any such misrepresentations here in view of the uncertain nature of what the tabular information really means. As I do not find the table to have any probative value on the issues before me, further discussion is unnecessary.

As also noted above, the RA has also sought to include in the record information developed after this matter was appealed (AF 68-74), notwithstanding 20 C.F.R. § 655.112(a)(1). No due process issues are implicated. However, assuming, *arguendo*, that the memorandum dated April 5, 1996 and attachments from Steve Horton should be considered as part of the Administrative File, it would still not change the result. The information obtained from the nurseries at most shows that the nursery owners believe that a fruit farmworker may be trained quickly, **not** that experience in budding and pruning fruit trees is not a "normal and accepted" qualification, and the information from Chilton Area Horticulture (Auburn Extension Service) substantiates that budding and grafting requires more time to learn than simple labor work such

as weeding or hoeing. The second-hand accounts made by Mr. Howard are, however, not definite enough to be given much probative value, especially as the one grower contacted by Mr. Horton provided a somewhat different account than he had originally provided to Mr. Howard. (*Compare* AF 70 *with* AF 71). Again, as this information lacks probative value, there is no need for additional discussion.

ORDER

IT IS HEREBY ORDERED that the Acting Regional Administrator's denial of temporary alien labor certification in the above-captioned matter is REVERSED and temporary alien agricultural labor certification shall be GRANTED.

At Washington, D.C.

PAMELA LAKES WOOD
Administrative Law Judge

PLW/trs